

## A DECLARATION OF INDEPENDENCE FOR NEW HAMPSHIRE'S PRESCRIPTION RESTRAINT LAW

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New Hampshire's Prescription Restraint Law (the "PRL"), NH RSA Secs. 318:47-f & g and 318-B:12, IV (2006), prohibits the use or sale for commercial purposes of prescription information containing "physician-identification" data. In November, 2008, the First Circuit Court of Appeals decided the law was constitutional. On March 27, 2009, IMS Health, Inc. and Verispan, LLC (the "Plaintiffs") petitioned the United States Supreme Court to review that decision.

The PRL, in prohibiting such use or sale of any prescription information that includes the name of the physician who wrote it ("physician-identifiable information"), targets the long-established and wide-spread practice of collecting specific information from pharmacies about every prescription they fill and selling that information to pharmaceutical manufacturers. It should be noted that the use or sale of physician-identifiable information is not otherwise regulated. Such information is "de-identified" health information under HIPAA and, as such, does not require an authorization from the patient.

The PRL is the first attempt by any state, or the federal government, to regulate the use or sale of physician-identifiable information. The stated purpose of the New Hampshire Legislature in enacting the PRL was to promote public health and to reduce the cost of health care. Health information companies purchase physician-identifiable information and configure it to show the specific drugs, and the amounts of such drugs, prescribed by given physicians. This information is used in a number of ways, including its use by drug manufacturers to encourage physicians through published advertisements, mailings and visits by the manufacturers' representatives ("detailers") to prescribe the more expensive, brand name drugs they manufacture, as opposed to treating patients with no drugs or less expensive older or generic drugs.

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In response to the enactment of the PRL, in July, 2006, the Plaintiffs sued the Attorney General of New Hampshire to have all, or part, of the law declared unconstitutional. They alleged, among other flaws, that the PRL violated their First Amendment guaranty of free speech. The Complaint describes at some length the useful purposes served by the use and sale of physician-identifiable information, including the “effective implementation of prescription drug recall programs, performance of pharmaceutical market studies, efficient pharmaceutical sales and marketing resource allocation, and assessment of drug utilization patterns (e.g., on-and-off label uses and regional variations of physician prescribing behavior).”

The New Hampshire District Court in 2007 held the PRL unconstitutional, finding among other things, that it flunked the test for restricting commercial speech because New Hampshire could not show that it advanced the two stated purposes cited by the legislature. The First Circuit Court of Appeals then reversed the District Court. The First Circuit decided first that the PRL restricts conduct only, not speech because it “serves only to restraint the ability of data miners to aggregate, compile and transfer information destined for narrowly defined commercial ends.” It then decided that even if the PRL restricted speech it satisfies the requirements for regulating commercial speech in that it contains health care costs because (1) detailing increases the cost of prescription drugs, (2) detailers’ access to physician-identifiable information contributes to the success of detailing and (3) detailing does not contribute to patient health.

As noted above, the Plaintiffs on March 27, 2006 filed a petition asking the U.S. Supreme Court to review the First Circuit’s decision. In general, the U.S. Supreme Court takes about three months to act on such petitions. We should, therefore, know on or about Independence Day (July 4th) whether the Supreme Court will deny the petition, which will result in a Declaration of Independence for the PRL.

Alternatively, the Supreme Court will grant the petition and schedule a hearing on whether to affirm or reverse the First Circuit’s decision that the PRL is constitutional.

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